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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NOV 30 2004

JAMES R. LARSEN, CLERK
DEPUTY
SPOKANE, WASHINGTON

8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

10 THE PAUL REVERE LIFE INSURANCE)
COMPANY,)

11 Plaintiff,)

12 v.)

13 MARCUS AND JOE DOE DEWOOD,)
14 AND THEIR MARITAL COMMUNITY,)

15 Defendants.)

No. **CV-04-0456-LRS**

**COMPLAINT FOR
DECLARATORY RELIEF**

16 Plaintiff The Paul Revere Life Insurance Company alleges as follows:

17 **PARTIES AND JURISDICTION**

18 1. Plaintiff The Paul Revere Life Insurance Company ("Paul Revere") is a
19 foreign insurer organized under the laws of the Commonwealth of Massachusetts.

20 2. Defendants Marcus DeWood, M.D., and Jane Doe DeWood are residents
21 of Spokane County, Washington. The name of Marcus DeWood's spouse is not
22

COMPLAINT FOR DECLARATORY RELIEF - 1

Case No.

116008.0027/1156150.1

LANE POWELL SPEARS LUBERSKY LLP
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1 presently known to Paul Revere and for that reason it utilizes the name "Jane Doe"
2 DeWood for purposes of identifying her in this complaint. Defendants will
3 hereinafter be collectively referred to as "DeWood."

4
5 3. Jurisdiction in this Court is proper under 28 U.S.C. § 1332. Federal
6 diversity jurisdiction exists because all parties are completely diverse and the amount
7 in controversy exceeds \$75,000.

8 4. Venue is proper in this Court.

9 **BACKGROUND**

10 5. Prior to September 27, 1997 DeWood was insured under a policy of
11 disability insurance issued by Paul Revere under Policy No. 01026485910.

12 6. On September 27, 1997 DeWood stopped working at his cardiology
13 practice.
14

15 7. At this time DeWood was 57 years old.

16 8. DeWood's medical records suggest that before his retirement he was
17 suffering from symptoms of alcoholism.

18 9. On December 22, 1997, Dr. DeWood's attorney sent to Paul Revere an
19 undated letter from DeWood notifying Paul Revere of Dr. DeWood's disability claim.
20 On January 6, 1998 Paul Revere sent a claim form for Dr. DeWood to complete.
21
22

1 When this was not returned a second claim form was sent on February 3, 1998.
2 DeWood did not respond to these or other reminders and/or requests.
3

4 10. DeWood's undated letter indicated that he was in residential care for the
5 treatment of possible alcohol and drug addiction at Springbrook Hospital.

6 11. DeWood's letter did not suggest he suffered from cognitive impairment
7 or anterior vermis syndrome.
8

9 12. On or about April 1, 1998 Paul Revere received a "Claimant's
10 Statement" from DeWood. On or about April 6, 1998 Paul Revere received an
11 "Attending Physician Statement" from Dr. Gregory Skipper.

12 13. In his Claimant's Statement DeWood identified his disabling sickness as
13 "chemical dependency, alcoholism." By letter of April 6, 1998 Paul Revere
14 requested DeWood provide information from the Washington State Diversionary
15 Program. Paul Revere also requested a specific authorization for the release of
16 records from Springbrook Hospital. DeWood did not return the medical
17 authorization, but in a letter received on or about July 30, 1998 sent a different form of
18 authorization, which he had apparently created himself.
19

20 14. Dr. Skipper's attending physician's statement of April 6, 1998 indicated
21 DeWood's primary diagnosis was "alcohol dependence" and his secondary diagnosis
22 of "anterior vermis syndrome."

1 15. Dr. Skipper opined in his Attending Physician Statement that within 6-12
2 months, he expected DeWood to be able to perform some of the duties of his work.

3 16. Dr. Skipper's statement suggested that a neurology report had been
4 completed by Dr. Zimmerman.

5 17. Dr. Zimmerman's neurology report was not submitted to Paul Revere by
6 DeWood or his attorney at that time.

7
8 18. On or about April 20, 1998, Paul Revere received a January 21, 1998
9 Progress Report and a November 19, 1997 assessment letter authored by Dr.
10 Zimmerman to Dr. Skipper, pursuant to a request by Paul Revere.

11 19. The November 1997 report from Dr. Zimmerman indicates that as of that
12 date DeWood had alcoholic central nervous system problems, including mild anterior
13 vermis syndrome. These conditions were improving. The residuals from his
14 condition were mild and acceptable for professional function at that time.

15
16 20. Dr. Zimmerman's November 1997 report indicates that DeWood's
17 cognitive function would be tested.

18 21. On May 7, 1998 Paul Revere requested DeWood identify all of his
19 treating health care providers.

20 22. Dr. Camplair tested DeWood's cognitive function on December 11, 1997
21 and January 16, 1998.
22

1 23. Paul Revere was not provided with Dr. Camplair's report until July 31,
2 1998, and the information contained in it was at least six months old.

3 24. Dr. Camplair's report recommended against DeWood returning to an
4 unsupervised, independent cardiology practice at that time. Dr. Camplair's report also
5 outlined two alternative options: (1) a gradual, supervised return to work; and (2) a
6 later re-evaluation after a lengthier period of sobriety.

7 25. On October 1, 1998, Paul Revere wrote to DeWood's attorney, Peter
8 Moye, again requesting records Paul Revere needed to assess DeWood's claim.

9 26. On or about December 28, 1998, DeWood submitted a Physicians
10 Statement completed by Dr. Dan Coulston who concluded that DeWood had a "good
11 prognosis" and could "work without restriction" in "6 months."

12 27. On or about March 19, 1999 Paul Revere again wrote DeWood's
13 attorney, Peter Moye requesting additional information and updated medical records.

14 28. On April 29, 1999 DeWood and his attorney met with a representative of
15 Paul Revere. DeWood indicated his alcohol and drug dependency were not currently
16 impairing him and that he had been sober for over a year.

17 29. On August 24, 1999, Paul Revere sent a \$32,000 benefit payment. This
18 sum reflected the benefits payable after the 90 day elimination period, from
19
20
21
22

1 September 27, 1997 through April 1, 1998 as a result of DeWood's disability of
2 alcoholism and chemical dependency.

3 30. Following this payment Paul Revere continued to review DeWood's
4 claim that he was disabled due to anterior vermis syndrome.

5 31. Following internal medical reviews at Paul Revere of the collected
6 medical records, on November 8, 1999, Jennifer LeMoine wrote Attorney Moye and
7 advised him that the medical documentation did not appear to support a disabling
8 condition. She noted that the records made available to Paul Revere were not
9 complete. She indicated additional records could be submitted to Paul Revere for its
10 consideration. When no response was forthcoming, she sent a follow up letter in
11 December 1999.
12

13 32. After reviewing records from Dr. Giddings and Dr. Bonneau, requested
14 by Paul Revere, Paul Revere wrote DeWood's attorney a January 20, 2000 letter
15 indicating that there was no new information which would substantiate DeWood's
16 claim for total disability. This letter informed DeWood he had a right of appeal that
17 could be exercised within 90 days.
18

19 33. On March 27, 2000, DeWood's attorney requested an additional 120 days
20 to collect information and bring an appeal. This was the first response by either De
21 Wood or his attorney to the requests from Paul Revere in November 1999 and January
22

1 2000. This letter further indicated that DeWood's attorneys were not then in a
2 position to independently evaluate whether DeWood should appeal.

3 34. Over four months later, on August 9, 2000, DeWood's attorney sent Paul
4 Revere a report by Dr. William Bozarth, which had been prepared in May 2000.

5 35. After requesting additional information and reviewing the available data,
6 Paul Revere requested an IME.

7 36. Paul Revere's policy provided it the right to obtain an IME as often as
8 reasonably required while a claim was pending.

9 37. After discussions with DeWood's attorneys, an IME was scheduled to
10 take place on April 12 and 13 in Beaverton, Oregon.

11 38. DeWood's attorneys unilaterally canceled the IME on April 3, 2001.

12 39. Thereafter, Paul Revere again requested an IME on June 27, 2001.

13 40. On July 23, 2001 DeWood's attorney indicated he would submit to an
14 IME if Paul Revere believed it was needed after it reviewed the report of a vocational
15 examination performed by Fred Cutler.

16 41. In August 2001 Paul Revere reiterated to DeWood's attorney that it had
17 the right and the need to obtain an IME. Neither DeWood nor his attorney objected to
18 the IME. In fact, DeWood's attorney submitted questions he wanted submitted to the
19 IME doctors. The IMEs were scheduled for October and November, 2001.

20 42. Dr. Bostwick performed the neuropsychological examination on October
21 29, 2001. Paul Revere received his report on November 12, 2001. Dr. Bostwick
22

1 opined that (1) findings consistent with a mild alcohol-related encephalopathy were
2 "equivocal;" (2) there was evidence of "secondary gain" in Dr. DeWood's medical
3 charts; and (3) the identified neurobehavioral impairments were "relatively mild in
4 severity." Dr. Bostwick went on to state, however, that: "I am unaware of any
5 specific restrictions in his ability to conduct his usual and customary occupation on a
6 reasonably continuous basis, however, he does appear to have some mild limitations
7 in his ability to sustain attention and concentration for extended periods without loss
8 of mental set, a probable mild reduction in his speed of mental operations, and a mild
9 impairment in his mental flexibility and higher level reasoning and concept formation
10 skills."

11 43. On November 16, 2001, Paul Revere received another letter from
12 DeWood's attorney that attacked the credibility and independence of Dr. Lemil
13 Alamarez who Paul Revere had asked to perform a neurological examination of
14 DeWood on November 29, 2001.

15 44. The neurological IME scheduled with Dr. Alamarez went forward on
16 November 29, 2001. Thereafter Dr. Alamarez opined that in light of DeWood's
17 troubles with spatial disturbance and some dystrexia, DeWood would not be able to
18 return to work as an interventional cardiologist."

19 45. Because of the differences of opinion between Dr. Alamarez and Dr.
20 Bostwick, the IME's were referred to Paul Revere's internal doctors for review.
21
22

1 46. The IME reports were then sent to DeWood's attorney. Two more copies
2 were sent to him on January 31, 2002. One week later, on February 6, 2002, Paul
3 Revere a \$469,000 check to DeWood's attorney representing past benefits.

4 47. After accepting the policy benefits, DeWood now claims additional
5 funds, attorney fees in excess of \$75,000, plus interest. In response, Paul Revere has
6 reviewed these issues and is in the process of paying an additional \$1000 in past
7 policy benefits. Paul Revere denies any other claims for monies.

8 **FIRST CAUSE OF ACTION:**

9 **DECLARATORY JUDGMENT/CONTRACTUAL DUTIES FULFILLED**

10 48. Paul Revere adopts and incorporates by this reference the allegations
11 from paragraphs 1-47.

12 49. provided a policy of disability insurance to DeWood.

13 50. DeWood's disability policy with Paul Revere is a contract.

14 51. The parties' contract contemplates that disability claims will be
15 submitted to Paul Revere for review and assessment.

16 52. The review and assessment process contemplates that claimants like
17 DeWood will submit materials to support their claim and/or allow Paul Revere to
18 obtain such materials.

19 53. The claims process necessarily involves an ongoing exchange of
20 information.

21 54. DeWood is required to cooperate in the claims process.

22
COMPLAINT FOR DECLARATORY RELIEF - 9

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1 55. In reviewing and assessing DeWood's claims, Paul Revere requested
2 information from DeWood.

3 56. DeWood and his attorneys did not always promptly supply the requested
4 information to Paul Revere.

5 57. DeWood's conduct delayed the claims process.

6 58. After completing its review, Paul Revere paid DeWood the amount he
7 was owed under his disability policy. Thereafter, Paul Revere has continued to make
8 monthly benefit payments to DeWood.

9 59. DeWood has accepted the amount he was initially paid in benefits and
10 has continued to accept the monthly payments that have been made thereafter.

11 60. This Court should enter a declaratory judgment that Paul Revere has
12 fulfilled its contractual obligations to its insured in good faith and that DeWood is not
13 entitled to receive any other monetary payment or recovery under any other theory,
14 including but not limited to breach of contract or bad faith, from Paul Revere.

15 **SECOND CAUSE OF ACTION:**

16 **DECLARATORY JUDGMENT/ACCORD & SATISFACTION**

17 61. Paul Revere incorporates by reference paragraphs 49 – 60 of this
18 complaint.

19 62. DeWood's acceptance of past benefits and ongoing benefits constitutes
20 an accord and satisfaction with respect to all claims under his insurance contract and
21 the claims handling process.

1 63. This Court should enter a declaratory judgment that DeWood's
2 acceptance of past benefits and ongoing benefits is an accord and satisfaction and that
3 he is not entitled to any other monetary payment or recovery under any other theory
4 from Paul Revere.

5 **THIRD CAUSE OF ACTION:**

6 **DECLARATORY JUDGMENT/STATUTE OF LIMITATIONS**

7 64. Paul Revere incorporates by reference paragraphs 49 – 63 of this
8 complaint.

9 65. DeWood has demanded that Paul Revere make payments in addition to
10 those it is making under its policy of insurance.

11 66. DeWood is premising his right to receive those payments upon actions
12 taken by Paul Revere which occurred more than three years ago.

13 67. Such claims are barred by the applicable statute(s) of limitation and/or by
14 the doctrine of laches.

15 68. This Court should enter a declaratory judgment that any claims by
16 DeWood are barred by the applicable statute(s) of limitations and/or by the doctrine of
17 laches.

18 **FOURTH CAUSE OF ACTION:**

19 **DECLARATORY JUDGMENT/JUDICIAL ESTOPPEL**

20 69. Paul Revere incorporates paragraphs 41-68 by reference.
21
22

1 70. DeWood has previously litigated the issue of his attorneys' fees in a suit
2 filed by his former attorneys titled *Workland & Witherspoon et al, plaintiffs v. Marcus*
3 *DeWood, defendant*, Spokane District Court No. 22048304.

4 71. In that suit DeWood took the position that he was not obligated to pay to
5 his attorneys some or all of the fees he now seeks to recover.

6 72. In that suit DeWood asserted numerous affirmative defenses to the effect
7 that he should not be obligated to pay the fees sought by his attorneys. Paul Revere
8 incorporates by reference DeWood's Answer, Affirmative Defenses and
9 Counterclaims in the *Workland* litigation. A true and accurate copy of that document
10 is attached to this complaint as Exhibit A.

11 73. In that suit DeWood asserted numerous counterclaims to the effect that
12 he should not be obligated to pay additional fees to his former attorneys, and further,
13 that they had been overpaid for the work performed. Paul Revere incorporates by
14 reference DeWood's Answer, Affirmative Defenses and Counterclaims in the
15 *Workland* litigation. A true and accurate copy of that document is attached to this
16 complaint as Exhibit A.

17 74. A party cannot change legal positions and theories simply because it is
18 expedient to do so. Such conduct is barred by the doctrine of judicial estoppel.

19 75. This Court should enter a declaratory judgment that DeWood is judicially
20 estopped from seeking to recover attorneys fees from Paul Revere when he has
21 previously taken the position in litigation that he is not obligated to pay those same
22 fees.

COMPLAINT FOR DECLARATORY RELIEF - 12

Case No.

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FIFTH CAUSE OF ACTION:

DECLARATORY JUDGMENT: WAIVER AND ESTOPPEL

76. Paul Revere incorporates by reference paragraphs 41 through 75 as if full set out herein.

77. DeWood sought policy benefits through the claims process.

78. DeWood was represented by counsel during the claims process.

79. DeWood has previously accepted and continues to accept benefits under Paul Revere's policy.

80. DeWood's acceptance of policy benefits constitutes a waiver and/or estoppel of his right to pursue other claims for contractual and/or extra-contractual damages.

81. This Court should enter a declaratory judgment that DeWood is barred from seeking to recover additional contractual or extra-contractual damages under the doctrines of waiver and/or estoppel.

PRAYER

Paul Revere asks this Court for the following specific relief:

1. For declaratory judgment against DeWood;
2. For an award of its attorneys' fees and costs; and,

DATED this 30th day of November, 2004.

By *D. Michael Reilly*
D. Michael Reilly, WSBA No. 14674
Charles C. Huber, WSBA No. 18941
Attorneys for Plaintiff
Paul Revere Life Insurance Company

VERIFICATION

I, George M. Thompson, Vice President and Managing Counsel for The Paul Revere Life Insurance Company declare under penalty of perjury under the laws of the United States of America that the allegations contained herein are true and correct to the best of my knowledge and belief.

DATED this 30th day of November, 2004 at Worcester, MA

A handwritten signature in cursive script, appearing to read "G. M. Thompson", followed by a horizontal line.

COPY
ORIGINAL FILED

OCT 16 2002

SPOKANE COUNTY DISTRICT COURT

DISTRICT COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

WORKLAND & WITHERSPOON, PLLC,)
 a Washington professional limited liability)
 company; LEE & ISSERLIS, P.S., a)
 Washington professional service)
 corporation,)

Case No.: 22048304

Plaintiffs,)

ANSWER, AFFIRMATIVE DEFENSES
AND COUNTERCLAIMS

vs.)

MARCUS A. DeWOOD, M.D.,)
 a single man,)

Defendant.)

Defendant, Marcus DeWood, M.D., ("DeWood") by and through his attorneys
 of record, McCormick, Dunn & Black, P.S., hereby responds to the Plaintiffs'
 Complaint as follows:

PLAINTIFF'S GENERAL ALLEGATIONS

1. DeWood does not have sufficient information to admit or deny the
 allegations contained in paragraphs 1 and 2 of Plaintiffs' Complaint, and, therefore,
 denies the same for lack of present information upon which to form a basis for belief.

ANSWER, AFFIRMATIVE DEFENSES AND . . . - 1

*McCormick, Dunn & Black, P.S.***EXHIBIT A**

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Suite 200, Fernwell Building
 505 W. Riverside
 Spokane, WA 99201

2. DeWood admits paragraph 3 of Plaintiffs' Complaint.

3. DeWood admits that portion of paragraph 4 of Plaintiffs' Complaint stating venue is properly laid in Spokane County, Washington. The remainder of this allegation is denied.

4. DeWood admits paragraph 5 of Plaintiffs' Complaint.

5. Defendant DeWood denies the allegations set forth in paragraph 6 of Plaintiffs' Complaint with respect to the date stated. The remainder of this allegation is admitted.

6. DeWood admits paragraph 7 of Plaintiffs' Complaint

7. DeWood admits paragraph 8 of Plaintiffs' Complaint.

8. As to paragraph 9 of Plaintiffs' Complaint, DeWood admits he entered into a fee agreement ("Agreement") with Plaintiffs relating to his Long Term Disability benefits in March of 2001. The remainder of the allegations of this paragraph are denied.

9. As to the first sentence of paragraph 10 of Plaintiffs' Complaint, DeWood does not have sufficient information to admit or deny the allegations contained therein, and, therefore, denies the same for lack of present information upon which to form a basis for belief. The remainder of the allegations in this paragraph are denied.

10. DeWood admits the allegations in paragraph 11 of Plaintiffs' Complaint, with the exception of the date stated, which is denied for lack of information.

11. DeWood admits the allegations in paragraph 12 of Plaintiff's Complaint, with the exception of the date stated, which is denied for lack of information.

ANSWER, AFFIRMATIVE DEFENSES AND . . . - 2

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12. As to the allegations in paragraph 13 of Plaintiffs' Complaint, DeWood admits he received a total of \$30,000 in disability payments under the policy, representing payments for the months of April, May and June 2002. The remainder of this allegations in this paragraph are denied.

13. DeWood denies paragraph 14 of Plaintiffs' Complaint.

14. By way of further denial, DeWood denies any and all contentions and allegations set forth in the Prayer of Plaintiffs' Complaint.

15. DeWood states further that any and all allegations as set for in Plaintiffs' Complaint not expressly admitted herein are expressly denied. DeWood further denies that Plaintiffs' have been damaged in any way or that they are entitled to relief of any sort from DeWood.

PLAINTIFFS' FIRST CAUSE OF ACTION
(Declaratory Judgment)

16. In response to paragraph 15 of Plaintiffs' Complaint, DeWood incorporates by reference its answers to the allegations referred to in such paragraph.

17. DeWood admits paragraph 16 of Plaintiffs' Complaint Admit.

18. As to paragraph 17 of Plaintiffs' Complaint, this is a legal conclusion to which no response is necessary. To the extent it contains factual assertions, however, such assertions are denied.

SECOND CAUSE OF ACTION
(Breach of Written Contract)

19. In response to paragraph 18 of Plaintiffs' Complaint, DeWood incorporates by reference its answers to the allegations referred to in such paragraph.

ANSWER, AFFIRMATIVE DEFENSES AND . . . - 3

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20. DeWood denies paragraph 19 of Plaintiffs' Complaint.

21. DeWood denies paragraph 20 of Plaintiffs' Complaint.

22. DeWood denies paragraph 21 of Plaintiffs' Complaint.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs' Complaint fails to state a claim upon which relief can be granted;

SECOND AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the Doctrine of Waiver and/or estoppel;

THIRD AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the Doctrine of Accord and Satisfaction;

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the Doctrine of Laches;

FIFTH AFFIRMATIVE DEFENSE

By way of defense, DeWood asserts that Plaintiffs' are barred from making any claims due the Doctrine of Payment and release;

SIXTH AFFIRMATIVE DEFENSE

Plaintiffs' are not entitled to bring, or to recover under any claim asserted against DeWood insofar as claims emanate from, or arise out of Plaintiffs' own bad faith conduct;

ANSWER, AFFIRMATIVE DEFENSES AND . . . - 4

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SEVENTH AFFIRMATIVE DEFENSE

1 Plaintiffs' are not entitled to bring, or to recover under any claim asserted
2 against DeWood insofar as claims emanate from, or arise out of Plaintiffs' taking
3 advantage of DeWood's diminished state of mind due to his disabilities, thereby
4 placing undue duress on DeWood;
5

EIGHTH AFFIRMATIVE DEFENSE

6
7 Plaintiffs' conduct violates the rules of professional conduct governing fee
8 distribution obligations that become a necessary and integral part of the contract;
9

NINTH AFFIRMATIVE DEFENSE

10
11 Plaintiffs' are not entitled to bring, or to recover under any claim asserted
12 against DeWood insofar as there has been a lack of consideration for any such
13 asserted obligations;
14

TENTH AFFIRMATIVE DEFENSE

15
16 The fees sought in Plaintiffs' Complaint are unreasonable and unconscionable.
17 As such, and as provided in the Agreement in question, DeWood seeks determination
18 from this Court as to the reasonableness of such fees.
19

20 DeWood, by way of reservation of rights and without waiver, does hereby
21 expressly reserve the right to amend his Answer and Affirmative Defenses in
22 accordance with the facts and issues as they may arise following further discovery and
23 investigation.
24
25
26

ANSWER, AFFIRMATIVE DEFENSES AND . . . - 5

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